BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

HOWARD S. HOMER Claimant VS. **MULLER CONSTRUCTION COMPANY** Respondent AND **AETNA CASUALTY & SURETY COMPANY** Insurance Carrier AND **KANSAS WORKERS COMPENSATION FUND**	)	Docket No. 144,563
HOWARD S. HOMER Claimant VS. **LOGAN & COMPANY** Respondent AND **UNITED FIRE & CASUALTY COMPANY** Insurance Carrier AND **KANSAS WORKERS COMPENSATION FUND**	)	Docket No. 144,564

ORDER

On May 16, 1996, the application of respondent (Logan) for review by the Workers Compensation Appeals Board of an Award entered by Assistant Director Brad E. Avery dated January 18, 1996, came on for oral argument.

APPEARANCES

Claimant appeared by and through his attorney, David L. McLane of Pittsburg, Kansas. Respondent, Muller Construction Company, and its insurance carrier appeared by and through their attorney, Kendall Cunningham of Wichita, Kansas. Respondent, Logan & Company, and its insurance carrier appeared by and through their attorney, James B. Biggs of Topeka, Kansas. The Workers Compensation Fund appeared not,

having been dismissed from this matter by Order dated March 28, 1994. There were no other appearances.

RECORD AND STIPULATIONS

The record and stipulations as specifically set forth in the Award of the Assistant Director are herein adopted by the Appeals Board.

ISSUES

Docket No. 144,564

(1) Whether claimant suffered accidental injury arising out of and in the course of his employment with Logan & Company on December 22, 1988.

(2) Whether written claim was submitted pursuant to the requirements of K.S.A. 44-520a for claimant's injury on December 22, 1988 with Logan & Company.

(3) Claimant's average weekly wage.

(4) The nature and extent of claimant's injury and/or disability.

Docket No. 144,563

(1) Whether claimant suffered accidental injury arising out of and in the course of his employment with Muller Construction Company on April 10, 1990.

(2) Claimant's average weekly wage.

(3) The nature and extent of claimant's injury and/or disability.

Docket Nos. 144,563 & 144,564

(1) Whether K.S.A. 44-5114(f) allows reimbursement to be ordered between insurance carriers when there is a dispute as to which respondent is liable and benefits have been paid pursuant to a court order by one or the other insurance carrier.

Additional issues not appealed to the Workers Compensation Appeals Board, but decided by the Assistant Director in the Award of January 18, 1996, are herein affirmed insofar as they are not inconsistent with the opinions expressed herein.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewing the whole evidentiary record filed herein, and in addition the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

Claimant, Howard S. Homer, was a laborer and construction worker employed by Logan & Company on December 22, 1988 when he suffered what he alleges to be an accidental injury arising out of and in the course of his employment. On the date of injury claimant's feet slipped out from under him while he was climbing down a ladder. He landed on his right shoulder and suffered a dislocated shoulder. He popped the shoulder back

into place and, after informing his employer, was referred to the Coffeyville Regional Medical Center Emergency Room where he was examined and x-rayed. As a result of his injury, claimant missed approximately one week of work. Thereafter, he returned to work for Logan for another week and then was laid off for lack of work on January 6, 1989. After being laid off from Logan & Company, claimant worked several jobs, including custodian for Medicine Lodge, Bobcat driver and laborer for Montgomery County Landfill, and laborer and construction worker for Lindesmith Construction Company. While working for Lindesmith claimant helped pour concrete and set concrete forms, used a shovel to dig holes and move concrete, and pushed a wheelbarrow loaded with concrete. Evidence indicated claimant worked with weights of up to 25 pounds while shoveling and up to 200 pounds while loading and moving the wheelbarrow. Claimant also used a jackhammer to break up old concrete structures.

Claimant testified that while working with Lindesmith his shoulder began to bother him to the point where he requested medical treatment from his former employer, Logan & Company. Apparently, during this time none was provided.

On January 12, 1990, claimant was laid off by Lindesmith. In February 1990 he began working for Muller Construction Company as a laborer. On April 10, 1990 claimant was using a sharp-shooter shovel to scrape tar off of a tank. When the sharp-shooter came into contact with a screw covered by the tar, the impact produced a sharp, sudden pain in claimant's right shoulder. He informed his employer, Fred Muller, of the accident and was referred for an examination and treatment. An arthrogram resulted in a diagnosis of a torn rotator cuff in claimant's right shoulder. He was eventually referred to Dr. C. Craig Satterlee, who performed surgery on the right shoulder on March 27, 1991.

Dr. Satterlee, a board-certified orthopedic surgeon, first saw claimant on May 4, 1990. At that time claimant described the incident on December 22, 1988 and further discussed the fact that his problem became more painful five or six months after the initial accident. Dr. Satterlee was asked his opinion regarding a comparison between the December 22, 1988 injury and the April 10, 1990 incident. Dr. Satterlee did express an opinion that he felt the December 22, 1988 incident caused or contributed to the ongoing symptomatology. On cross examination, when asked about the April 10, 1990 incident, he indicated claimant had never reported the specific incident to him. In treating claimant he diagnosed what he believed to be a rotator cuff tear. In looking at the arthrogram he opined he could not tell how long the tear had been present or at what point in time it developed. Dr. Satterlee did indicate that if claimant had suffered a rotator cuff tear after the December 1988 incident he would have been able to function doing heavy labor until April 1990 depending upon his pain tolerance and the size of the tear. He also acknowledged that claimant may have extended the tear, already present, with the shoveling incident. He agreed that every dislocation does not necessarily produce a rotator cuff tear. The claimant's conversation with the doctor to the effect that the pain became more severe months after the dislocation was an indication that either claimant was bleeding into the shoulder or, at some time, he suffered an extension of the rotator cuff tear from some traumatic event or from the impingement process itself. He went on to acknowledge that signs of a long-standing tear, including atrophy of the muscles, were not present at the time of his examination, suggesting claimant was able to use the arm without significant limitation. In discussing the cause of the claimant's additional pain, he opined either internal bleeding or an extension of the tear would have been the cause, but acknowledged that internal bleeding with no additional impairment would have resolved in time. The Appeals Board finds it significant that claimant experienced a sudden increase in pain with an immediate need for additional medical care subsequent to the incident on April 10, 1990. It is further significant that while claimant had discomfort in his shoulder before the April 10, 1990 incident, his shoulder condition never prevented him from doing his work as a laborer either for Lindesmith or for respondent Muller. After he struck the

screw with the shovel in April 1990, the pain was different from anything he had ever experienced before, being more intense.

In proceedings under the Workers Compensation Act the burden of proof is on the claimant to establish the claimant's right to an award of compensation by proving the various conditions upon which claimant's right depends by a preponderance of the credible evidence. *See* K.S.A. 44-501 and K.S.A. 44-508(g). *See* also, Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984). Whether an accident arises out of and in the course of a worker's employment depends upon the facts peculiar to the particular case. Messenger v. Sage Drilling Co., 9 Kan. App. 2d 435, 680 P.2d 556, rev. denied 235 Kan. 1042 (1984).

> "When a primary injury under the Workmen's Compensation Act arises out of and in the course of employment every natural consequence that flows from the injury is compensable if it is a direct and natural result of the primary injury." Gillig v. Cities Service Gas Co., 222 Kan. 369, 564 P.2d 548 (1977).

It is the function of the trier of facts to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991).

Docket No. 144,564

(1) Whether the claimant suffered accidental injury arising out of and in the course of his employment with Logan & Company on December 22, 1988.

The Appeals Board finds that claimant suffered accidental injury arising out of and in the course of his employment with Logan & Company on December 22, 1988. The evidence supports a finding that claimant suffered an injury on that date which necessitated his being referred for medical treatment and being off work for one week.

(2) Whether written claim was submitted pursuant to the requirements of K.S.A. 44-520a for claimant's injury on December 22, 1988 with Logan & Company.

Claimant testified that, while at the emergency room, he signed something which he believed was an accident report and presented it to the emergency room doctor. This "admission form" from the Coffeyville Regional Medical Center was provided to Logan & Company at some time. Claimant was unaware of how and when this form made its way to Logan & Company.

K.S.A. 44-520a(a) states in part:

> "No proceedings for compensation shall be maintainable under the workmen's compensation act unless a written claim for compensation shall be served upon the employer by delivering such written claim to him or his duly authorized agent, or by delivering such written claim to him by registered or certified mail within two hundred (200) days after the date of the accident, or in cases where compensation payments have been suspended within two hundred (200) days after the date of the last payment of compensation . . . ."

A written claim need not take any particular form so long as its purpose is to make a claim for workers compensation benefits. Whether an instrument is a written claim for compensation and whether such claim is timely filed is a question of fact. Ours v. Lackey,

213 Kan. 72, 515 P.2d 1071 (1973). It is the intention of the parties that determines what constitutes a written claim. Fitzwater v. Boeing Airplane Co., 181 Kan. 158, 309 P.2d 681 (1957). In this case claimant completed an admission form for the Coffeyville Regional Medical Center Emergency Room. He did not request that this form be provided to the respondent and has no idea how or when this document came into respondent's possession. It is acknowledged that respondent paid for the emergency room services subsequent to their being provided.

Claimant's intention in filling out this admission form is unclear. There is no indication that he desired this form to be provided to the respondent for the purpose of making a claim for workers compensation benefits. There is no indication that claimant was aware that this document arrived in respondent's hands at any time subsequent to this injury. As such, the Appeals Board finds claimant has failed to prove by a preponderance of the credible evidence that written claim was provided to respondent Logan & Company as is required by K.S.A. 44-520a. In this regard, the Award of Assistant Director Avery is reversed and claimant is denied benefits against Logan & Company and its insurance carrier, United Fire & Casualty Company, in Docket No. 144,564. This finding renders moot the remaining issues regarding claimant's average weekly wage and the nature and extent of claimant's injury and/or disability.

Docket No. 144,563

(1) Whether claimant suffered accidental injury arising out of and in the course of his employment with Muller Construction Company on April 10, 1990.

Claimant has alleged an additional injury while working for Muller Construction Company on April 10, 1990. The Assistant Director, in the Award, cites Helms v. Tollie Freightways, Inc., 20 Kan. App. 2d 548, 889 P.2d 1151 (1995), as support for the premise that, in order for claimant's second accident to be attributable to respondent Muller, it must be a new and separate accident that bears a causal relationship to the claimant's disability. The Assistant Director went on to find that claimant's condition did not indicate a new and wholly unrelated accident but probably one resulting from claimant's first injury. He found that claimant had never fully recovered from the 1988 injury. The Appeals Board acknowledges that claimant suffered ongoing symptomatology after his December 1988 injury. However, the incident on April 10, 1990 clearly exacerbated claimant's condition. The Appeals Board finds, based upon the claimant's testimony and the opinion of Dr. Satterlee, that claimant suffered additional injury on April 10, 1990 which necessitated his leaving work and undergoing surgical treatment for a rotator cuff tear.

A continuing disability which is aggravated by a subsequent incident is compensable as a natural consequence of the original injury. However, increased disability from a new and separate nonwork-related accident is not. If the second injury or disability was produced by a significant or traumatic event involving substantial force or unusual exertion, the second injury will constitute an "intervening cause." Stockman v. Goodyear Tire & Rubber Co., 211 Kan. 260, 505 P. 2d 697 (1973).

The Appeals Board finds that here, as in Stockman, claimant has suffered a second injury produced by a significant or traumatic event involving substantial force. The second injury occurring while claimant was employed with Muller Construction Company constitutes an "intervening cause" to claimant's ongoing shoulder symptomatology. This new and traumatic incident caused claimant to leave work and undergo rotator cuff surgery. The Appeals Board finds, therefore, the Award of Assistant Director Avery granting claimant an award against Logan & Company and finding the incident on April 10, 1990, to be a direct and natural result of claimant's injury on December 22, 1988, should be, and is hereby, reversed. The Appeals Board finds that claimant suffered a separate

accidental injury with increased disability on April 10, 1990 while working for Muller Construction Company.

(2) Claimant's average weekly wage.

With regard to the claimant's average weekly wage, the Appeals Board finds claimant had an average weekly wage of $240 per week while employed with Logan & Company and $299.61 per week while employed with Muller. In the Award claimant was granted benefits against Logan & Company based upon an average weekly wage claimant earned while working for Muller. The Appeals Board acknowledges this finding was in error. As the Appeals Board has modified the Award by granting benefits against Muller Construction Company, the average weekly wage of $299.61 is found to be the appropriate wage on which to base claimant's award.

(3) The nature and extent of claimant's injury and/or disability.

The appropriate test for determining claimant's permanent partial general disability is the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market has been reduced and the ability of the worker to earn comparable wages has been reduced, taking into consideration the employee's training, education, experience and capacity for rehabilitation. Hughes v. Inland Container Corp., 247 Kan. 407, 799 P.2d 1011 (1990). While Hughes does not mandate use of a specific formula to arrive at the extent of permanent partial disability, it does, nevertheless, require consideration of both factors above stated when computing the extent of permanent partial disability. Schad v. Hearthstone Nursing Center, 16 Kan. App. 2d 50, 816 P.2d 409, rev. denied 250 Kan. 806 (1991). The Appeals Board finds the undisputed testimony of Mr. Michael Lala that claimant has lost 87 percent of his access to jobs in the open labor market to be appropriate evidence upon which to base an award. Further, finding that claimant suffered a loss of wage-earning capacity of zero percent, is supported by the evidence considering claimant's pre-injury wage earnings. In comparing claimant's loss of access to the open labor market and loss of the ability to earn comparable wages, the Appeals Board finds claimant has suffered a 58.5 percent permanent partial general body work disability.

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The respondent, Logan & Company, requests reimbursement for sums expended by it after the injury of December 22, 1988. In its request, respondent Logan & Company cites K.S.A. 44-5,114 in support of its request for reimbursement. The pertinent part of K.S.A. 44-5,114 states as follows:

> "(f) On final determination of liability, any insurance carrier determined not to be liable for the payment of benefits is entitled to reimbursement for the share paid by the insurance carrier from any insurance carrier determined to be liable."

The Appeals Board acknowledges the language of K.S.A. 44-5,114 appears on point in this situation. However, a review of the legislative history of this statute shows that it did not come into existence until July 1, 1993, some two years and nine months after claimant's injury on April 10, 1990, and over four years after the 1988 date of injury. The Appeals Board finds this significant modification of the statute to be a substantive change, thus, disallowing any effect on any accidental injury occurring prior to its effective date of July 1, 1993.

However, K.S.A. 1989 Supp. 44-556(e) was amended by the Kansas Legislature, effective July 1, 1989, to read as follows:

> "If compensation, including medical benefits, temporary total disability benefits or vocational rehabilitation benefits, has been paid to the worker by the employer, the employer's insurance carrier or the workers compensation fund during the pendency of review by the district court or by appellate courts, and the employer, the employer's insurance carrier or the workers compensation fund, which was held liable for and ordered to pay all or part of the amount of compensation awarded by the director or district court, is held not liable by the final decision on the appeal or review for the compensation paid or is held liable on such appeal or review to pay an amount of compensation which is less than the amount paid pursuant to the award, then the employer, employer's insurance carrier or workers compensation fund shall be reimbursed by the party or parties which were held liable on such appeal or review to pay the amount of compensation to the worker that was erroneously ordered paid by the director or district court. The director shall determine the amount of compensation which is to be reimbursed to each party under this subsection, if any, in accordance with the final decision on the appeal or review and shall certify each such amount to be reimbursed to the party required to pay the amount or amounts of such reimbursement. Upon receipt of such certification, the party required to make the reimbursement shall pay the amount or amounts required to be paid in accordance with such certification. No worker shall be required to make reimbursement under this subsection or subsection (d)."

At the preliminary hearing of August 29, 1990, the Administrative Law Judge granted the motion of the attorney for Muller Construction Company to consolidate these matters for the consideration of all evidence. As such, the Appeals Board finds it has jurisdiction over all parties involved and jurisdiction to order reimbursement pursuant to K.S.A. 1989 Supp. 44-556(e). The Appeals Board finds that Logan & Company and its insurance carrier, United Fire & Casualty Company, are entitled to reimbursement for all benefits paid as a result of the injuries suffered by claimant for both the December 22, 1988, injury and the injury suffered on April 10, 1990. Said reimbursement shall come from Muller Construction Company and its insurance carrier, Aetna Casualty & Surety Company, for the benefits provided as a result of the April 10, 1990 injury and from the Kansas Workers Compensation Fund for the benefits paid from the December 22, 1988 injury, and shall include, but not be limited to, any and all temporary total disability compensation, temporary partial disability compensation and permanent partial disability compensation as well as any medical expenses and costs associated with the injury of April 10, 1990.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the January 18, 1996 Award of Assistant Director Brad E. Avery in Docket No. 144,564 shall be reversed and claimant Howard S. Homer is denied award against respondent, Logan & Company and its insurance carrier, United Fire and Casualty Company, for the accidental injury occurring on December 22, 1988.

AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Howard S. Homer, and against the respondent Muller Construction Company and its insurance carrier, Aetna Casualty & Surety Company, in Docket No. 144,563 for an injury suffered on April 10, 1990, and based upon an average weekly wage of$299.61.

Claimant is entitled to 85.71 weeks temporary total disability compensation at the rate of $199.75 per week totalling $17,120.57, followed by 329.29 weeks permanent partial disability at the rate of $116.85 per week, totalling $38,477.54 for a 58.5% permanent partial general body disability making a total award of $55,598.11.

As of July 23, 1996, there would be due and owing to claimant 85.71 weeks temporary total disability compensation at the rate of $199.75 per week in the sum of $17,120.57, plus 242.29 weeks permanent partial general body disability at the rate of $116.85 per week totalling $28,311.59, for a total of $45,432.16 which is due and owing and ordered paid in one lump sum minus amounts previously paid. Thereafter, claimant is entitled to 87 weeks permanent partial general body disability at the rate of $116.85 per week in the sum of $10,165.95 until fully paid or further order of the Director.

Respondent Logan & Company and its insurance carrier, United Fire & Casualty Company, are ordered to be reimbursed from Muller Construction Company and its insurance company, Aetna Casualty & Surety Company, for all sums expended per the above order for the injury of April 10, 1990.

Respondent Logan & Company and its insurance carrier are entitled to reimbursement from the Kansas Workers Compensation Fund for all benefits paid and costs for the December 22, 1988 date of accident per the terms of the above Order.

The January 18, 1996 Award of Assistant Director Brad E. Avery is affirmed in regard to all issues not brought before the Appeals Board insofar that they are consistent with the opinions and orders expressed herein.

Pursuant to K.S.A. 44-536 claimant's contract of employment with his counsel is hereby approved.

Fees necessary to defray the expenses of the administration of the Kansas Workers Compensation Act are hereby assessed against respondent Muller Construction Company and its insurance carrier, Aetna Casualty & Surety Company, with respondent Logan & Company and its insurance carrier, United Fire & Casualty Company, entitled to reimbursement for any of the following sums paid by them, upon presentation of an itemized statement verifying payment of same, to be paid as follows:

Karen Starkey	
Transcript of Preliminary Hearing	$171.30
Transcript of Preliminary Hearing	Unknown
Debra D. Oakleaf	
Transcript of Preliminary Hearing	$212.20
Transcript of Preliminary Hearing	$ 95.50
Patricia K. Smith	
Regular Hearing Deposition of Howard Homer	$311.70
Martin D. Delmont	
Deposition of Michael K. Lala	$377.60
Hostetler & Associates, Inc.	
Deposition of C. Craig Satterlee, M.D.	$586.05
Appino & Achten Reporting Service	
Deposition of Larry Lindesmith	$198.25
Heather A. Lohmeyer	
Deposition of Bill Boan	Unknown

IT IS SO ORDERED.

Dated this ____ day of August 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: David L. McLane, Pittsburg, KS
Kendall Cunningham, Wichita, KS
James B. Biggs, Topeka, KS
William L. Phalen, Pittsburg, KS
Brad E. Avery, Assistant Director
Nelsonna Potts Barnes, Administrative Law Judge
Philip S. Harness, Director